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In the Supreme Court of the United States

OCTOBER TERM, A. D. 1956

NO. 485

HAROLD L. WARNER

Petitioner

VS.

FIRST NATIONAL BANK OF MINNEAPOLIS

Respondent

PETITION FOR WRIT OF CERTIORARI

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Comes now petitioner and respectfully represents and shows to the Court in his Petition for a Writ of Certiorari:

1.

Basis for Application

(a) The United States Court of Appeals for the Eighth Circuit has rendered a decision in this case upon which judgment has been entered, which is in conflict with the decisions of other Courts of Appeal on the same matter.

(b) The United States Court of Appeals for the Eighth Circuit has rendered a decision in this case upon which judgment has been entered, which is in conflict with prior decisions of the same Court on the same matter, and in conflict with decisions of this Court and other Courts of Appeal.

(c) The United States Court of Appeals for the Eighth Circuit has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such

departure by a lower Court as to call for an exercise of this Court's power of supervision.

2.

Opinion of Court Below

The Opinion of the Court below has not as yet been officially reported. A copy of the Opinion is appended to this Petition.

3.

Date of Judgment

The date of the Opinion and Judgment is September 11, 1956. There has been no re-hearing.

4.

Jurisdiction to Review

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari is Title 28, Section 1254(1) of the United States Code, and provides:

> "Cases in the Courts of Appeal may be reviewed by the Supreme Court in the following methods: (Par. 1), By Writ of Certiorari granted upon the petition of any party in any civil or criminal proceeding, before or after rendition of judgment or decree."

5.

The Questions Presented for Review are:

(a) In an action commenced having for its purpose the forfeiture of fees of a fiduciary and for damages for failure to perform its duties all as a fiduciary and as Managing Advisor of an estate with overall powers as set forth in the Last Will and Testament of the deceased in words and figures as follows:

> "My Executors shall exercise all of the powers set forth in this Section or otherwise possessed by them as Executors under the laws of the State of Florida, *only*

in such manner as FIRST NATIONAL BANK AND TRUST COMPANY OF MINNEAPOLIS, as Managing Advisor, shall in writing approve or direct. The acceptance by my Executors of the Executorship under this Will shall be conclusive evidence of their approval and acquiescence in all of the provisions of this Section. *My Executors shall be relieved of any liability for* any loss which may result from the retention of investments or the sale of any property belonging to the estate or the reinvestment of any funds, or *for any other action or non-action resulting from following the written approval or written directions of said Managing Advisor.* As long as my Executors follow the written directions of said Managing Advisor, the liability of said Executors shall be limited to the exercise of reasonable care and diligence, safekeeping of the estate assets, proper maintenance of records, the accounting to the proper court and to the Managing Advisor, and to the legatees entitled thereto, and the furnishing to said Managing Advisor of copies of all documents filed in Probate Court and the furnishing to the Managing Advisor of such further information as it may from time to time request. *My Executors, hereinabove named, are directed to make such accounts and as often as requested to do so to the Managing Advisor, and are directed to consult with and obtain approval of the Managing Advisor before taking any action of any kind affecting the assets of the estate or the interests of the legatees or beneficiaries hereunder.* My Executors are further directed to make and file proper Federal estate tax returns and Federal income tax returns and all other tax returns required by law and to pay all such taxes accruing thereunder as may be required, but before filing any such tax returns or paying any tax that may be assessed thereunder, my Executors shall first present such proposed tax returns to the Managing Advisor for its approval and they shall not be filed until so approved as to form and substance. Nothing herein contained shall be deemed to deprive the Court in which this Will is probated, from ordering and directing the Executors as to any matter in connection with the pro-

bate of my estate, even though such action may not be approved or directed by said Managing Advisor, provided, however, that *before any such order of court is made that said Managing Advisor shall be given due and sufficient notice of the application for such order and the hearing thereon, so as to enable said Managing Advisor, which is also the residuary Trustee hereunder, to appear in court by counsel and to resist such application and proposed order of court. I have made the above provisions for the handling of my estate and for the duties imposed hereunder on said Managing Advisor for the reason that it has been familiar with my affairs for many years and is acquainted with the members of my family and because of its inability, under the laws of Florida, to act as the Executor of my estate in that State.* I have given them the powers of approval and direction with no intent to place the title to or any interest whatsoever in, my estate during probate, in said Managing Advisor, it being my intent to place the full legal title and all interests in the assets of my estate, in my Executors above named, subject to the conditions hereinabove stated." (Italics supplied.) (V-1 p. 172, et seq.)

where, during the period of time involved in the action, the fiduciary or Managing Advisor was also the appointed Trustee of a Residuary Trust under the Will and entitled as such to the entire residue of the estate in question, and the only person in existence to bring an action, will the Statute of Limitations run against the cause of action during the time the fiduciary or Managing Advisor occupies the position of control and the two conflicting positions? The United States Court of Appeals for the Tenth Circuit (*Yager v. Liberty Royalties Corporation* (C. A. 10), 123 F. 2d 44, 1941) has held that the Statute of Limitations is tolled "during the time one person represents both sides of a conflicting claim." Similar decisions have been announced in *Gunther v. Philadelphia & R. Ry. Co.*, 1 F. 2d 85 (C. A. 3); *Collier v. Goessling*, 160 Fed. 605 (C. A. 6);

Fulenweider's case, 9 Ct. Cl. 403. In the case at bar the Court has held that the Statute of Limitations is not tolled in identical circumstances set forth in the above cases (see pages 37 and 38 of the Opinion), and consequent thereon there is a conflict between the Court of Appeals of the Eighth and Courts of Appeal of other Circuits on the same matter.

(b) Under the circumstances set forth above, and, assuming for the present purposes only, that the Statute of Limitations had barred any action on facts disclosed "On March 19, 1947, or occurring after March 19, 1947, and not discovered by beneficiaries until after February 15, 1948" (page 43 of the Opinion), the Court held that the Statute of Limitations barred relief from breaches occurring prior to March 19, 1947, and not discovered by beneficiaries until on or after February 15, 1948. This holding is in conflict with the decisions of this Court and of the United States Court of Appeals for the Eighth Circuit and other Courts of Appeal in other Circuits. In the decided cases, citation of which should hardly seem necessary, the rule is clearly announced that concealment, fraud and information fraudulently withheld always tolls the Statute of Limitations until discovered, whereas the holding of the Circuit Court of Appeals of the Eighth Circuit being the law of the case unless reversed, apparently prevents appropriate amendment to the pleadings, if found necessary, to permit testimony of concealed facts *prior* to March 19, 1947.

(c) In review of what is stated in (b) above, the Court in foreclosure of amendment to the pleadings has departed from the accepted and usual course of judicial proceedings so as to call for the exercise of this Court's power of supervision, as plaintiff cannot safely proceed

with the case in the District Court unless the denial of this Writ of Certiorari shall be construed as an interpretation of the Court's said Opinion to the effect as to permit any appropriate amendment to the pleadings pertaining to the question of lack of actual notice and knowledge on the part of parties in interest prior to March 19, 1947.

6.

Statement of the Case

This action was commenced as a class suit on the 15th day of February, 1954.

Plaintiff is a citizen of the State of Nevada. The defendant is a National Banking Institution with its place of business located in Minneapolis, Minnesota. The matter in controversy exceeds the sum or value of $3,000.00, exclusive of interest and costs. The jurisdiction of the Court is conferred by the provisions of Title 28, Section 1332, United States Code.

The action involves transactions which took place throughout the probate of the estate of Ellsworth C. Warner in the County Judge's Court, Palm Beach County, Florida, herein referred to as the Florida Court.

On motion made by the defendant in the District Court, that Court dismissed the action on the grounds, among others, that the Statute of Limitations barred any recovery by plaintiff (V-2, p. 223). This motion was granted by the District Court solely on the grounds that the Statute of Limitations barred recovery although other grounds for dismissal were urged by defendant (V-2, p. 1).

On appeal to the Circuit Court of Appeals, Eighth Circuit, that Court affirmed the judgment of dismissal on the grounds of the Statute of Limitations as to all claims based on any transactions occurring on or before March 19, 1947. The judgment was modified to exclude from the bar

of the Statute of Limitations claims (6) and (18) of the Complaint (V-1, p. 46 and p. 120) and any claims based on any transactions occurring subsequent to February 15, 1948, on any transactions occurring after March 19, 1947, and not discovered by the beneficiaries until after February 15, 1948.

This judgment of the Circuit Court of Appeals was prompted by its conclusion that since the final report filed by the Executors of the estate after the 1947 final accounting, was not filed until July, 1948, for that reason there was a possible fact question as to whether beneficiaries had knowledge of any improper conduct occurring after March 19, 1947, and before the Statute of Limitations became operative on February 15, 1948. This Opinion and Judgment of the Circuit Court of Appeals, therefore, decrees that under no circumstances would the plaintiff be permitted to introduce testimony at the trial of the case of any facts occurring *before* March 19, 1947, even though such facts were withheld wrongfully from the beneficiaries. Uncertainty exists as to whether an amendment to the pleading would now be permissible in view of this judgment based on the Court's Opinion.

The relief sought, among other things, is (1) a forfeiture of the amount paid to defendant as alleged compensation as Managing Advisor of the estate of Ellsworth C. Warner, including the amount paid to defendant's officers, agents and employees; (2) that defendant be surcharged with the amount paid to the Executors as costs, expenses, and for alleged compensation; (3) that the estate of Ellsworth C. Warner be reimbursed the amount of monies paid out for Attorneys' fees for defendant and the Executors of the estate to the extent that the Court determines that such fees and costs paid out were not for the benefit of the estate *and were in excess of an agreed amount that the Executors*

and the Managing Advisor would receive as their compensation; (4) that the aggregate amount of the loss in probate of the estate of said deceased, which is attributable to the neglect and failure of the defendant to perform its duties as Managing Advisor, be reimbursed to the estate; (5) that to the extent that the Court may find that the legatees have personally suffered by reason of the defendant's failure to perform its duties, that amount be surcharged against the Managing Advisor for the benefit of the estate and earmarked for payment to such heirs and legatees (V-1, p. 161).

The specific claims of breach of duty couched in general terms of ultimate facts are set forth in paragraph 27 (V-1, p. 18) of the Complaint. Following this the claims are particularized by alleging more detailed facts. They consist generally of the following:

V-1, p. 24 Beneficiary required unjustly to pay interest—	$ 1,373.97
V-1, p. 34 Defending against unjust claims of disinheritance—	4,409.49
V-1, p. 44 Loss on speculation with funds—	106,162,73
V-1, p. 44 Brokers' fees paid in speculation—	5,000.00
V-1, p. 46 Amounts paid out by beneficiary to get information on speculation—	9,444.24
V-1, pp. 62-64 Interest paid on deficiencies because of filing erroneous tax returns—	63,907.22
V-1, p. 62 Additional Attorneys' fees on settlement erroneous tax returns—	9,567.82
V-1, p. 80 Salaries wrongfully paid —	14,250.00
V-1, p. 85 Loss Sale First Bank Stock Corp.	203,800.00
V-1, p. 89 Loss Sale 7th Street Property—	40,000.00
V-1, p. 100 Loss Sale Pierce Property—	75,000.00

V-1, p. 112 Excessive Executors' fees—Defendant received one-half—	350,000.00[1]
V-1, p. 125 Costs on successfully resisting wrongful charge of Attorneys' fee —	(to be ascertained)
V-1, p. 134 Interest unpaid on daily deposits in Executors' Bank (Exhibit B Complaint)—	179,706.34
V-1, p. 137 Interest on annuities, payment of which delayed—	118,000.00
V-1, p. 150 Excessive income tax required to be paid by estate—	188,387.98
V-1, p. 154 Loss on sale of bonds belonging to estate—	192,216.57
V-1, p. 156 Loss on sale of stocks belonging to estate—	224,476.14
V-1, p. 160 Plaintiff's costs in acquiring and assembling facts (estimated)—	125,000.00
	$1,910,702.50

These transactions all occurred during probate and while the defendant was occupying both positions of Managing Advisor and the Trustee of the Residuary Trust.

[1] Subject to adjustments.

Resulting from these breaches of duty, the liability of defendant is clear.[2]

Ellsworth C. Warner died January 5, 1942, testate, while a resident of the State of Florida. He had been, however, a resident of the State of Minnesota for many years prior to 1932.

The deceased could not appoint the defendant as Executor of his estate since a foreign corporation could not qualify as such in Florida. He, therefore, did the next best thing,

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[2] *Washington Loan & Trust Co. v. Colby*, App. D. C., 108 F. 2d 743; *In re Jennings' Estate*, 74 Mont. 468, 241 Pac. 655; *In re Rutledge*, 162 N. Y. 31, 56 N. E. 511; *In re Shenk's Estate*, 125 Misc. Rep. 386, 211 N. Y. S. 514; *Armstrong v. McFarland's Administrator*, 187 Ky. 185, 218 S. W. 1012; *In re Reich's Estate*, 230 Pa. 55, 79 Atl. 151; *Finnell v. Kellogg*, 194 Mo. App. 342, 186 S. W. 1169; *Enright v. Sedalia Trust Company*, 323 Mo. 1043, 20 S. W. 2d 517; *In re Drake's Will*, 195 Minn. 464, 263 N. W. 439, 101 A. L. R. 801; *Webb v. Webb*, 250 Ala. 194, 33 So. 2d 909; *Beakley v. Cunningham*, 121 Ark. 457, 181 S. W. 287; *In re Kafitz's Estate*, 51 Cal. App. 325, 196 Pac. 790; *In re Thompson's Estate*, 101 Cal. 349, 35 Pac. 991, 36 Pac. 508; *In re Pennewell*, 12 Del. Ch. 408, 105 Atl. 377; *Lehman v. Rothbart*, 159 Ill. 270, 42 N. E. 777; *Booth v. Bradford*, 114 Ia. 562, 87 N. W. 685; *Burnham v. Kelly*, 299 Mich. 452, 300 N. W. 127; *Henderson v. Sherman*, 47 Mich. 267, 11 N. W. 153; *Lipic v. Wheeler*, 362 Mo. 499, 242 S. W. 2d 43; *Baird v. Lane*, 115 Neb. 413, 213 N. W. 512; *In re Jula's Estate*, 3 N. J. Misc. R. 976, 130 Atl. 733; *H. F. Cartwright & Bros. v. United States Bank & Trust Co.*, 23 N. M. 82, 167 Pac. 436; *In re Ellis*, 176 App. Div. 425, 163 N. Y. S. 27; *Matter of Onorato's Will*, 261 App. Div. 997, 26 N. Y. S. 2d 648; *In re Walsh's Executors*, 126 Misc. Rep. 479, 214 N. Y. S. 167; *In re Rees' Will*, 97 N. Y. S. 2d 606, Mod. and Aff'd (1951), 302 N. Y. 647; *Allen v. Royster*, 107 N. C. 278, 12 S. E. 134; *In re Kline's Estate*, 280 Pa. 41, 124 Atl. 280; *In re O'Neill's Estate*, 266 Pa. 9, 109 Atl. 526; *Neely v. People's Bank of Anderson*, 133 S. C. 43, 130 S. E. 550; *U. S. Fidelity & Guaranty Co. v. Coughlan*, 189 Ark. 499, 73 S. W. 2d 468; *Donlon v. Maley*, 60 Ind. App. 25, 110 N. E. 92; *In re Myers' Estate*, 234 Ia. 502, 12 N. W. 2d 211; *Brewster v. Demarest*, 48 N. J. Eq. 559, 23 Atl. 271; *Chapman v. Brite*, 4 Tex. Civ. App. 506, 23 S. W. 514; *In re Anderson's Guardianship*, 209 Ia. 191, 225 N. W. 258; *MacBryde v. Burnett*, U. S. D. C. Md., 44 Fed. Supp. 833, aff'd U. S. C. C. A. 132 F. 2d 898; *In re Allard*, 49 Mont. 219, 141 Pac. 661; *Wotton v. De Reau*, 59 App. Div. 584, 69 N. Y. S. 753; *In re Hodges' Estate*, 66 Vt. 70, 28 Atl. 663; *In re Hutkoff's Estate*, 124 Misc. 703, 209 N. Y. Supp. 588.

in his opinion, by appointing the defendant Managing Advisor of his estate with powers and duties as set forth in his Will and quoted under Section IV of this petition. The reasons prompting him to appoint the defendant Managing Advisor are set forth in his Will (V-1, p. 183) as follows:

> "I have made the above provisions for the handling of my estate and for the duties imposed hereunder on said Managing Advisor for the reason that it has been familiar with my affairs for many years and is acquainted with the members of my family and because of its inability under the laws of Florida, to act as Executor of my estate in that State."

For many years prior to his removal to Florida, the deceased had been associated with the personnel of the defendant and was a member of its Board of Directors.

In Section 23 of his Will (V-1, p. 172), the deceased designated and appointed the defendant as Trustee of a Residuary Trust in his estate, which Trust is for the use and benefit of his four sons, Harold (plaintiff herein), Maurice, Bisbee and Wendell, and the wives and children and possibly the minor grandchildren of Harold and Maurice (V-1, p. 175).

The defendant remained the duly appointed Residuary Trustee throughout the entire period of probate while it was acting as Managing Advisor. The defendant's formal appointment and the confirmation of the Residuary Trust provided for by Section 23 of decedent's Will, took place in the District Court, Fourth Judicial District, County of Hennepin, State of Minnesota, on the 19th day of March, 1945 (V-1, p. 13).

The Executors named in decedent's Will were appointed on the 10th day of January, 1942, and the estate was in probate until November 11, 1954 (twelve years and ten

months), during which time the defendant was given due recognition as Managing Advisor within the scope of its powers and duties as such in apparent recognition of the deceased's expressed wishes in his Will.

The gross estate of the deceased inventoried at $10,-205,297.56. After deductions there was left for disbursements to beneficiaries $2,809,910.59 (Exhibit C Complaint). It is not claimed that all of the shrinkage resulted from the breaches of duty of the defendant, as substantial amounts were paid in claims, liquidating expenses, taxes and the like. The aggregate of the claims against the defendant as embraced in the Complaint will exceed a million and one-half dollars.

All legacies have been paid and the only remaining beneficiary of the estate is the said Residuary Trust, of which the defendant is the Trustee, and plaintiff is a beneficiary.

To the end that all of the facts alleged in the Complaint may be given consideration and read upon the claim of the right to forfeiture of compensation of the Managing Advisor, delay in closing the estate and other claims, it is alleged in Paragraph 21, V-1, p. 15 of the Complaint that all material facts alleged with respect to each claim are to be taken into consideration as reading on all other claims without repetition in the pleadings. The Complaint is drafted on this theory.

On or about the 24th day of January, 1947, the Executors of the estate with the approval of the Managing Advisor (V-2, p. 4, p. 11) filed what purported to be (but was not) their final return and petition for discharge. The plaintiff and his wife filed lengthy objections to this so-called final account on or about the 15th day of March, 1947 (V-2, p. 12, p. 31). Under date of April 18, 1947, the Florida Court filed its Order on the objections to the final account and reserved jurisdiction to make further Orders not in-

consistent therewith (V-2, p. 36, p. 43). Motion was filed by the plaintiff and his wife, and others, dated May 8, 1947, for rehearing on the so-called final accounting (V-2, p. 43). Thereafter proceedings were had in the Florida Court as incorporated in Volume 2 of the Record from pages 43 to and including page 179. On the 11th day of November, 1954 the Florida Court filed its final Order discharging the Executors (V-2, p. 185).

All proceedings in the Florida Court had to do with objections made to actions taken by the Executors and at no time was the duty, responsibility or liability of the Managing Advisor, as such, called into question in the Florida Court, since it was not an officer of the Florida Court.

No administrator ad litem was applied for or could have been appointed by the Florida Court for reasons stated in "Argument Amplifying The Reasons Relied On For The Allowance Of The Writ", hereinafter set forth.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The Issues Analyzed.

The theory of this case must be kept in mind for a proper approach to its consideration. Some fundamental concepts are manifest. We invite the Court's attention to the careful analysis of the pleadings and theory of the case which is pointed out as follows:

(a) The action is not one involving the estate of Ellsworth C. Warner directly. It is an action seeking reimbursement to the estate for the benefit of the Residuary Trust and the beneficiaries thereof by reason of depletion of his estate occurring during administration, in which estate the Residuary Trust is the sole beneficiary.

(b) The action is not against the Executors of the estate who were officers of the Florida Court. The action is one against the Managing Advisor who was not an officer of the Florida Court (see Opinion page 31).

(c) The action is not based on neglect of duty of the Executors as such. It is an action for breach of duty of the Managing Advisor in directly doing things it should not have done and in failing to require the Executors to do things they should have done, or in failing to prevent the Executors from doing what is claimed they should not have done, but did do.

(d) The action is only incidentally concerned with the neglect on the part of the Executors to perform their duty as imposed on them by the laws of Florida and the law generally. It is an action to impose liability on a fiduciary-managing advisor, for failure to carry out a trust bestowed upon it through confidence and a belief on the part of the deceased that it would be strictly adhered to, and the failure to perform which resulted in that neglect of duty on the part of the Executors.

(e) This is not a case where the estate of the deceased is the so-called party in interest. It is an action where the Residuary Trust provided for in the Will and its beneficiaries are the real parties in interest.

(f) This is not an action where the Executors would or would be likely to sue the Managing Advisor for its breach of duty with any expectation of success. The Executors were relieved of liability in following approval of the Managing Advisor (V-1, p. 182). They benefited personally in some of the transactions consisting of breach of duty and realistically could and should have made restitution voluntarily. Such a suit, if commenced, would have very unusual aspects.

(g) This is not a case where the Trustee of the Residuary Trust would or would be likely to sue the Managing Advisor, as such course of procedure would result in suing itself. Such an action would require the First National Bank of Minneapolis to be both plaintiff and defendant, as representative in two different capacities. Furthermore, having benefited personally in some of the transactions, it is obvious that the self-interest removed any such steps on defendant's part from the field of expectation.

(h) This is not a case where the performance of the duty of the defendant as Managing Advisor has been approved by any Court in any proceedings heretofore had. Its action could not be expected to be approved by the Florida Court, except as may be implied indirectly by acquiescence of the Florida Court in things done by the Executors with the approval of the Managing Advisor. This is because the Managing Advisor was not an officer of the Florida Court. In no other or collateral proceedings have the responsibilities of the Managing Advisor, as such, ever been questioned or measured.

(i) This action is one to measure the liability of the Managing Advisor based solely on its duties as specified in the quoted section 33 of decedent's Will. No Court has as yet ever passed on that duty or its breach.

(j) This is not a case where a single breach of duty of the Managing Advisor would afford a basis for the overall claims for relief. It is a case where the entire period of probate must be considered to ascertain whether a pattern was followed, or where the magnitude or accumulation of the breaches justified the relief sought. For instance, the permitting of substantial deposits to remain on hand without paying interest (Exhibit B Complaint) might subject the fiduciary to surcharge but not necessarily be the basis

for forfeiture of fees (*MacBryde v. Burnett,* 44 Fed. Supp. 833, aff'd 132 F. 2d 898), unless accompanied by other breaches of duty. Many other similar situations are in the case. (See *In re Drake's Will,* 195 Minn. 464, 263 N. W. 439; *Enright v. Sedalia Trust Company,* 323 Mo. 1043, 20 S. W. 2d 517.) Therefore, the ending of the duty by the closing of the estate would ordinarily be the proper date for the start of the running of the Statute of Limitations in the absence of other facts in the case postponing the operation of the Statute beyond that date.

(k) This is not a case where the Florida Court would have jurisdiction to appoint an administrator ad litem to accomplish the purposes of this action (Opinion page 38), Section 732.55, *Florida Statutes* 1941, provides:

> "Whenever, in any proceeding before the county judge or in equity in the circuit court, it is necessary that the estate of a deceased person be represented, and there is no personal representative of such estate, or if the personal representative is interested adversely to said estate, or in such proceeding is enforcing his own debt or claim against the estate, the court in which the proceeding is pending shall appoint an administrator ad litem without bond for that particular proceeding. Whenever the facts authorizing such appointment appear of record, or are otherwise made known to the court, the court shall without notice appoint such administrator ad litem. The administrator ad litem shall, upon appointment, make and file an oath to faithfully discharge his duties and said proceeding shall then be further maintained, prosecuted or defended insofar as said estate is concerned, by said administrator ad litem and in his name as such."

This law was amended by §2, Ch. 22783, *Laws 1945* but in particulars not herein material.

Since the Managing Advisor whose conduct is called into question in this case was not an officer of the Florida Court, or a personal representative of the estate, and since in this

action only the conduct of the Managing Advisor is the subject of the action, under the limited scope of the provisions of the above quoted Statute, the Florida Court did not have jurisdiction to appoint an administrator ad litem to try out the issues raised in this case with respect to the duties of the Managing Advisor and their breach. Furthermore, if an administrator ad litem was appointed and he proceeded to litigate the propriety of the actions taken by the Executors, he would be foreclosed from recovery merely on the plea that the Executors had acted with approval of the Managing Advisor, because the clear provisions of the Will relieved the Executors from liability under such circumstances. To meet such a plea, the administrator ad litem could not litigate the effect of the provisions of the Will under which the Managing Advisor was appointed because the Statute gives him only the right to pass on the breach of duty, if any, of the Executors. Their performance of their duty, so far as being absolved from liability was concerned, would become evident on showing that what they did was approved by the Managing Advisor.

2. Conflict in Decisions—Conflicting Claims.

With the foregoing considerations in mind, we turn to the conflict of decisions in the Courts of Appeal.

The case of *Yager v. Liberty Royalties Corporation* (C. C. A. 10), 123 F. 2d 44, is a striking example of such conflict in the decisions. The manner in which the Court attempts to distinguish the *Yager* case from the case at bar cannot be sustained.

The pertinent holding in the *Yager* case is quoted on page 37 of the Opinion. In that case the parties litigant represented both a Trust and a Corporation, and for that reason they represented both sides of conflicting claims. Both the Trust and the Corporation had interested bene-

ficiaries and stockholders other than the defrauding parties, who normally could have asserted their rights in a representative capacity. In the case at bar we have interested beneficiaries of the Residuary Trust.

In the *Yager* case no beneficiaries of the trust or interested stockholders had come forward to prosecute the claim within the ordinary statutory period of limitations and while the conflict of interest prevailed. A like situation is present in the case at bar.

In the *Yager* case prior knowledge of the facts involved in the litigation must have come to interested parties as the opinion indicates that there had been other litigation of the same issues at some prior date. Notwithstanding that fact, the Court held the Statute was tolled during the period the conflicting interests prevailed. The same situation exists in the case at bar.

In the *Yager* case the Court holds that until a disinterested representative was appointed who was qualified to raise the issue, the Statute of Limitations did not start to run as there was no one in existence "by whom" and a different person "against whom" the claim might be enforced.

This is not a case where the Statute of Limitations should be made applicable as commencing with any particular transaction insofar as the claim for relief seeks a forfeiture of the fees, since forfeiture of fees is separate and distinct from the prayer for relief for damages resulting from breach of duty in any particular transaction. With respect to the representation of both sides of conflicting claims, this covered the entire period of probate. There is no date to pinpoint the commencement of the running of the Statute of Limitations on the breach resulting in the forfeiture of fees. Hence the *Yager* case is controlling and the conflict of the judgment in the case at bar with the decisions in the *Yager* case on this phase of the case is obvious.

Bogart, Trust and Trustees, V. 4, Pt. I, Section 870, and supplement thereto, states the rule to be that the Court *will permit* a suit by a cestui and cites cases illustrating the rule where such a situation exists. But in none of the cases cited and in none we have been able to locate, has the Statute of Limitations been invoked successfully against a cestui if he brings the action *after* the conflict of interests has ceased but within the period of the Statute of Limitations *thereafter.* In fact to require a cestui to bring the action while the conflict of interest is existing may defeat the suit itself (see sub-paragraph (j) above, this section). In the case at bar there was no one in existence "by whom" and a different person "against whom" this suit could have been commenced until this plaintiff commenced this action. This action was commenced, therefore, within the statutory period.

A similar conflict of decisions appears from *Gunther v. Philadelphia and R. Ry. Co.* (C. A. 3), 1 F. 2d 85, and *Fulenweider's* case, 9 Ct. Cl. 403. These cases are similar to the case at bar. The only difference is in form and not substance. In these cases the Courts hold that the Statute of Limitations did not run against the claim until a representative of the estate of a deceased was duly appointed to prosecute it. The parties eventually appointed in the actions to prosecute the claims were parties who had knowledge of the existence of the claim within the normal statutory period, as well as knowledge of the death of the party who owned the claims, yet the Statute was held not to bar the claims until the representative of the estate was appointed. Similarly in the case at bar, the delay in bringing the action by a cestui is not a bar conceding that the cestui had knowledge within the normal statutory period of the facts but did commence the action within the statutory period after the conflict of interest ceased, or had ceased for all practical purposes.

We return then to the question of the general conflict of decisions and the ultimate effect of the decisions and judgment in the case at bar, and particularly its effect on the rule announced in the above decisions, clearly illustrated in the *Yager* case.

In every situation where a party represents "both sides of a conflicting claim," there must be in existence a party, or parties, *other* than the one occupying the two positions. Otherwise there would never be a "conflicting claim". If the party other than the one occupying the two positions is required to bring an action within the normal period of the Statute of Limitations notwithstanding that during the time the representation of both sides of the conflicting claims prevailed, then there could never be a situation where the rule would be applicable. Every party interested in the "claim" would be required to bring his action before the normal Statute ran and while the dual representation was in existence or be forever barred, since the Statute would not be tolled by the dual representation. Such is the rule announced in the case at bar. It is obvious, therefore, that the judgment in the case at bar not only is in conflict with the decision of the *Yager* and other cases, but it abrogates the rule itself. The question then is, is there to be one rule in the Tenth Circuit and a different rule in the Eighth Circuit?

A rule of law announced and adhered to in the decisions for such an extended period of time as is exemplified in the above decisions ought not to be abrogated or interpreted so as to lose its effect unless it is crystal clear that the rule announced is an erroneous principle or law, or had become sterile in changing conditions. Neither situations present themselves here.

Bogart, supra, we believe has announced the basic principle and the sound doctrine. While *Bogart's* statement per-

tains primarily to parties, when read in the light of the rule of the *Yager* and other cases, it certainly means that since the plaintiff commenced this action within the Statutory period after the defendant ceased for all practical purposes to represent both sides of a conflicting claim, he, as a cestui, is properly and timely in Court under the *permissive rule* to protect the interests of the Residuary Trust.

A contrary rule would require multiplicity suits, would make litigation so expensive as to make it impossible for the average cestui to protect his right, and would compel the bringing of actions prematurely and defeat complete relief.

3. Conflict of Decisions With Respect to Concealment and Withholding Information.

It certainly requires no citation of authorities that the almost universally recognized rule in this Court and in all Federal and State Courts is that the Statute of Limitations does not commence to run on a claim arising out of fraud, concealment or withholding information until knowledge of the claim is brought home to the moving party.

The decision and judgment in the case at bar, which becomes the law of the case, forecloses the plaintiff from a showing at the trial of the case that many of the facts upon which the claims are based did not come to the knowledge of plaintiff and other parties in interest until within the six years prior to the commencement of the action.

The judgment provides unequivocally that "The judgment of dismissal on the ground of the Statute of Limitations will be affirmed as to all claims based upon any transactions occurring on or before March 19, 1947. The judgment will be modified to exclude from the bar of the Statute of Limitations claims 6 and 18, and any claims

based upon any transaction occurring subsequent to February 15, 1948, or any transaction occurring after March 19, 1947, and not discovered by beneficiaries until after February 15, 1948" (p. 43 Opinion).

The transactions occurring *before* March 19, 1947, and not discovered until after February 15, 1948, are as material for consideration, if not discovered until after February 15, 1948, as those occurring after March 19, 1947, particularly where, as here, a fiduciary relationship existed. Since the judgment directs otherwise, it is in open conflict with the decided cases. (Note 173 *A. L. R.* 578.)

4. Departure From the Accepted and Usual Course of Judicial Proceedings.

It may well be that allegations are absent in the Complaint itself that material facts did not come to the knowledge of the plaintiff and other parties in interest within the said 6 year period and for that reason an amendment setting forth such allegations would be appropriate. The point is made, however, that in view of the positive mandate of the judgment on appeal, plaintiff cannot safely proceed in the Court below either with or without the amendments unless the judgment on appeal is modified, at least making allowance for a permission of an allegation showing concealment and withholding information in accordance with the decided cases with which the judgment in the case at bar is clearly in conflict.

Since a judgment of dismissal is affirmed, subject to the exceptions noted in the judgment on appeal, it may well be anticipated that defendant may successfully resist any attempt to amend the Complaint on the return of the mandate, advancing as reasons therefor, that, since the judgment of dismissal is affirmed, the case is dismissed, and there is nothing left to amend in the District Court. We do not

believe the Circuit Court of Appeals ever intended such result, but the wording of its judgment leaves little room for doubt as to its effect.

The situation clearly illustrating this position taken for the issuance of this Writ appears from the following facts:

In the Complaint plaintiff alleges a breach of defendant's duty as Managing Advisor in speculation with the funds of Oldworth Trading Co., Ltd. (V-1, p. 39 et seq.). One of the objections made by plaintiff in the Florida Court to the so-called final account of the Executors on March 19, 1947, was,

> "The Executors of this estate had charge of the Ellsworth Company, which owned all of the outstanding and issued stock in the Oldworth Trading Co., Ltd., a Canadian Corporation, having its place of business in Winnipeg, Manitoba, Canada, and while these Executors have had charge of the assets of said Corporation, they have allowed excessive charges to be made in connection therewith, and have committed waste and have been negligent in their managements of its affairs, and in one instance have disposed of property of said Corporation worth in excess of $300,000.00 at such a price as to cause a loss of approximately $50,000.00 to the said Corporation, and thereby resulted in a depletion of the assets of this estate in a substantial amount, all of which was done in violation of the duties of these Executors while acting in their fiduciary capacity" (V-2, p. 19).

Clearly plaintiff was referring to "one instance" which is not alleged in the Complaint. The speculation that is complained of in the Complaint occurred over a period from 1943 to 1947, inclusive (V-1, p. 44), and information concerning which was not obtained until, after meeting continuous resistance in getting it, it was obtained through the efforts of an Attorney employed March 23, 1948, in Winnipeg to get such information (affidavit of Chaim N. Kush-

ner, V-2, p. 208). When the information was obtained through efforts covering an extended period after March 23, 1948, it proved to be speculations in many different occasions covering an extended period of time and not "one instance" of default. Furthermore, the information obtained and set forth in the Complaint proved to be entirely different than that set forth in the objections to the so-called final account filed March 19, 1947. Yet the judgment in the Appellate Court does not permit any testimony of facts, either with or without amendment, occurring *prior* to March 19, 1947, even though they were actually withheld from the interested parties and not obtained until after March 19, 1947. Obviously then, this judgment is in conflict with the decided cases of the Courts of Appeal and by its provisions it has departed from the accepted and usual course of judicial proceedings permitting amendments, as to call for this Court's power of supervision.

Furthermore, the acts and conduct on the part of the defendant, as alleged in the Complaint, acting as *both* Managing Advisor and Trustee of the residuary trust, were breaches of its duty as a fiduciary in both capacities, as that duty is prescribed by Regulation F and Appendix, adopted and promulgated by the Board of Governors of the Federal Reserve System under *Title 12, Sec. 221, etc., of the United States Code*,[3] governing its member banks, including this defendant. It may be readily shown that neither the plaintiff nor any of the other beneficiaries of the Residuary Trust had knowledge of the provisions of said Regulation F and Appendix or would be charged with knowledge thereof (the regulation not being a law) at any time excepting shortly prior to the commencement of this

[3] The pertinent sections of said Regulations are quoted at page 16 et seq. of the Complaint and directly applied in allegations at pages 40, 80 and 132 of the Complaint.

action, nor did they have such knowledge of their rights arising out of defendant's failure to conform to the requirements thereof, nor knowledge of any right of action incident thereto. The failure of the defendant to take action in the Florida Court was an implied representation that plaintiff *had no rights*, at law or under the provisions of the Regulation. Notwithstanding that fact, the plaintiff evidently is foreclosed from asserting his rights, even by amendment to the Complaint, because the judgment in the appellate court so limits the field of inquiry. Clearly this is a departure from the accepted and usual course of judicial procedure, particularly when confidential relations exist (*Stark v. Equitable Life Assurance Soc.*, 205 Minn. 138, 285 N. W. 466). On the other hand, had the appellate court followed the holding in the *Yager* case, which plaintiff could reasonably expect it to do, all of the facts could be presented on the trial and no amendment to the pleadings would be made necessary, as, under the *Yager* case, the Statute of Limitations did not run during the time the defendant represented both sides of the conflicting claims. Hence plaintiff's position asserted in this subsection is integrated with his claim in subsection 2 of this section.

CONCLUSION

It is respectfully submitted that the Writ of Certiorari should issue.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 15,478

Harold L. Warner,

Appellant,

v.

First National Bank of Minneapolis,

Appellee.

Appeal from the United States District Court for the District of Minnesota.

[September 11, 1956.]

R. H. Fryberger (M. R. Keith was with him on the brief), for Appellant.

Joseph H. Colman (Harold G. Cant; Frank W. Plant, Jr.; John G. Dorsey; Dorsey, Owen, Barker, Scott & Barber; and Cant, Taylor, Haverstock, Beardsley & Gray were with him on the brief), for Appellee.

Before Gardner, Chief Judge, and Johnsen and Van Oosterhout, Circuit Judges.

Van Oosterhout, Circuit Judge.

This is an appeal from a summary judgment dismissing plaintiff's petition upon the ground that plaintiff's cause of action was barred by the statute of limitations. This action

was commenced on February 15, 1954, and is a class suit for the benefit of parties interested in the estate of Ellsworth C. Warner, hereinafter called decedent, who died testate, a resident of Florida, on January 5, 1942. Decedent's will was admitted to probate by the Florida court on January 9, 1942, and two Florida banks nominated as executors were appointed executors and served in that capacity. Decedent in his will named the First National Bank of Minneapolis, defendant herein, as managing advisor of his estate, giving to said defendant broad supervisory powers.[1] Decedent had formerly resided in Minneapolis and had

[1] Decedent's will, after providing for the appointment of executors, contains the following provisions pertaining to the managing advisor:

"My Executors shall exercise all of the powers set forth in this Section or otherwise possessed by them as Executors under the laws of the State of Florida, only in such manner as FIRST NATIONAL BANK AND TRUST COMPANY OF MINNEAPOLIS, as Managing Advisor, shall in writing approve or direct. The acceptance by my Executors of the Executorship under this Will shall be conclusive evidence of their approval and acquiescence in all of the provisions of this Section. My Executors shall be relieved of any liability for any loss which may result from the retention of investments or the sale of any property belonging to the estate or the reinvestment of any funds, or for any other action or non-action resulting from following the written approval or written directions of said Managing Advisor. As long as my Executors follow the written directions of said Managing Advisor, the liability of said Executors shall be limited to the exercise of reasonable care and diligence, safekeeping of the estate assets, proper maintenance of records, the accounting to the proper court and to the Managing Advisor, and to the legatees entitled thereto, and the furnishing to said Managing Advisor of copies of all documents filed in Probate Court and the furnishing to the Managing Advisor of such further information as it may from time to time request. My Executors, hereinabove named, are directed to make such accounts and as often as requested to do so to the Managing Advisor, and are directed to consult with and obtain approval of the Managing Advisor before taking any action of any kind affecting the assets of the estate or the interests of the legatees or beneficiaries hereunder. My Executors are further directed to make and file proper Federal estate tax returns and Federal income tax returns and all other tax returns required by law and to pay all such taxes accruing thereunder as may be required, but before filing any such tax returns or paying any tax that may be assessed thereunder, my Executors shall first present such proposed tax returns to the Managing Advisor for its ap-

been a director of defendant bank. Defendant had considerable familiarity with the decedent's property interests and his family problems. Defendant had agreed with the decedent to serve as managing advisor, and acted in such capacity throughout the administration of the estate. Defendant's rights as managing advisor were recognized by the executors. In most instances the executors obtained the advisor's approval of any proposed reports or applications, and consulted with the defendant generally as to all estate problems.

Plaintiff's complaint consists of 247 numbered paragraphs covering 200 pages. Plaintiff seeks relief against the defendant for damages for loss occasioned to decedent's estate by reason of defendant's failure to perform the duties it assumed as managing advisor. The complaint, after reciting background material and general allegations of the duties assumed by the managing advisor, particularizes the various alleged improper transactions in separate counts. Plaintiff alleges that the managing advisor failed to do things which it should have done, and improperly executed

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proval and they shall not be filed until so approved as to form and substance. Nothing herein contained shall be deemed to deprive the Court in which this Will is probated, from ordering and directing the Executors as to any matter in connection with the probate of my estate, even though such action may not be approved or directed by said Managing Advisor, provided, however, that before any such order of court is made that said Managing Advisor shall be given due and sufficient notice of the application for such order and the hearing thereon, so as to enable said Managing Advisor, which is also the residuary Trustee hereunder, to appear in court by counsel and to resist such application and proposed order of court. I have made the above provisions for the handling of my estate and for the duties imposed hereunder on said Managing Advisor for the reason that it has been familiar with my affairs for many years and is acquainted with the members of my family and because of its inability, under the laws of Florida, to act as the Executor of my estate in that State. I have given them the powers of approval and direction with no intent to place the title to or any interest whatsoever in, my estate during probate, in said Managing Advisor, it being my intent to place the full legal title and all interests in the assets of my estate, in my Executors above named, subject to the conditions hereinabove stated."

duties it did perform. Some of plaintiff's principal specific complaints are that the managing advisor failed to require proper accounts and reporting by the executors; that poor supervision of estate and income tax returns created liability for penalty, interest, and attorney's fees; that careless supervision of the sale of the estate's stocks and bonds caused needless loss; that the managing advisor should have insisted that the executors pay interest on unreasonable cash balances they maintained in their own banks; that defendant permitted the estate to be loaded with excessive expenses; that defendant permitted the payment of excessive attorneys' fees; and that the payment of legacies and the distribution and closing of the estate were unduly delayed. A further complaint, considerably stressed, is that the executors were allowed fees in the amount of $400,000, of which the defendant received one-half, and that such fees were paid in violation of a fee agreement with the decedent that the total executors' fees would not exceed $50,000. Plaintiff also contends that the antagonistic attitude taken by the defendant toward the beneficiaries and the refusal to supply the beneficiaries with adequate information as to the affairs of the estate compelled the beneficiaries to institute litigation to protect their interests and to obtain information, and that they are entitled to reimbursement for the expenses so incurred. To enumerate in detail all of plaintiff's claims would unduly extend this opinion. The claims of plaintiff are summarized in footnote 3 to the trial court's opinion, 135 F. Supp. 687, 689-690.

All claims and legacies due from the Warner estate have been paid. The decedent's will leaves all of his residuary estate to the defendant bank as trustee. Any loss incurred by the estate would affect only the residuary trust. The beneficiaries of the trust are the children of the decedent and their families. Plaintiff is a child of the decedent and a beneficiary of the residuary trust.

The defendant moved for a summary judgment upon the following grounds: (a) plaintiff's failure to join indispensable parties; (b) no cause of action stated; (c) res judicata; (d) lack of probate jurisdiction; (e) statute of limitations; and (f) laches.

The trial court sustained defendant's motion for summary judgment upon the ground that the plaintiff's cause of action was barred by the statute of limitations. The validity of this determination is the principal question before us on appeal. Defendant asserts that its other grounds for summary judgment support the dismissal of the plaintiff's claim and should be considered in the event we do not uphold the trial court's determination on the statute of limitations issue.

We shall first briefly consider the rules applicable to summary judgments. The trial court has correctly stated that a motion for summary judgment is an extreme remedy, and should be granted only in the absence of a genuine material fact issue. The burden of demonstrating the nonexistence of any genuine fact issue is upon the moving party, and all doubts shall be resolved against him. *Sartor v. Arkansas Natural Gas Corp.*, 321 U. S. 620, 627; *Traylor v. Black, Sivalls & Bryson*, 8 Cir., 189 F. 2d 213, 216.

We are required to examine the challenges made by the defendant to the trial court's jurisdiction. Diversity of citizenship and requisite jurisdictional amount are established insofar as the parties now before the court are concerned. Defendant urges that the executors or some other representative of the Warner estate, such as an administrator ad litem or, in their absence, at least all of the beneficiaries of the trust, are indispensable parties. There is considerable merit to such contention. See *Young v. Powell*, 5 Cir., 179 F. 2d 147; *McAndrews v. Krause*, Minn., 71 N. W. 2d 153; *Baker v. Dale*, W. D. Mo., 123 F. Supp. 364. The issue of

want of indispensable parties is not a jurisdictional one. *Young v. Powell,* supra; *Baker v. Dale,* supra. Rule 21 of the Federal Rules of Civil Procedure provides that parties may be added at any stage of the action upon such terms as are just. Ordinarily, dismissal should not be ordered for failure to join an indispensable party, but an opportunity should be afforded to bring in such party. *Keene v. Hale-Halsell Co.,* 5 Cir., 118 F. 2d 332; *Baker v. Dale,* supra; Moore's Federal Practice, Vol. 3, §21.04.

Defendant also urges that the plaintiff has not adequately pleaded the necessity for a class action, and that plaintiff is not a proper party to represent the class. It appears to us that there is a fact dispute as to the number of members of the class, and also a fact dispute as to whether plaintiff's rights are antagonistic to those of other members of the class. As pointed out by the trial court, any deficiency in respect to pleading a class action is subject to correction by amendment. Since some fact questions are involved, we do not believe that the question of whether this case comes within the field of a class suit should be determined by summary judgment.

Defendant further contends that the federal court is without probate jurisdiction and can not interfere with state probate proceedings. The federal courts have no probate powers and may not exercise their jurisdiction to disturb or affect the possession of property in custody of state courts. *Markham v. Allen,* 326 U. S. 490, 494. However, it appears to us that it is not here proposed to interfere with the probate powers of the Florida court. The managing advisor was not an officer of the Florida probate court, and the approval of the executors' accounting does not necessarily include approval of the managing advisor's conduct. The basis of this action is for damages against the managing advisor for breach of duties it assumed. The will pro-

vides that if the executors in good faith rely upon the advice of the managing advisor they are protected and freed from liability. There are situations where the managing advisor might be responsible and the executors are protected. For example, if the managing advisor fraudulently or carelessly advised the executors as to the value of some security with which the executors were not familiar, and the executors in good faith relied upon this advice and acted upon it, they would be protected but there might well be liability on the part of the advisor giving such advice.

We agree with the trial court that the defendant has not established want of jurisdiction with sufficient definiteness and clarity to warrant a summary judgment of dismissal on the ground of lack of jurisdiction at the present stage of the proceedings.

We now proceed to the question of whether the trial court was warranted in granting summary judgment dismissing plaintiff's claim upon the ground that the statute of limitations bars recovery by the plaintiff. The parties agree that this action is covered by the Minnesota statute of limitations, Minnesota Statutes, Annotated, §541.05, which so far as here applicable provides:

> "541.05 Various cases, six years
>
> The following actions shall be commenced within six years:
>
> (1) Upon a contract or other obligation, express or implied, as to which no other limitation is expressly prescribed;
>
> * * * * *
>
> (6) For relief on the ground of fraud, in which case the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud;

(7) To enforce a trust or compel a trustee to account, where he has neglected to discharge the trust, or claims to have fully performed it, or has repudiated the trust relation;

* * * * *"

Plaintiff contends subdivision (7) above quoted is the applicable statute, whereas defendant contends that subdivision (1) applies. The determination of the question of which subdivision applies is dependent upon whether or not defendant is a trustee of an express trust in its capacity as managing advisor. Subdivision (7) does not contain the limiting word "express", but the Minnesota Supreme Court has repeatedly held that subdivision (7) applies only to express trusts. *Jones v. Hammond,* 168 Minn. 131, 209 N. W. 864, 865; *Stillwater & St. P. R. Co. v. City of Stillwater,* 66 Minn. 176, 178, 68 N. W. 836, 837. In the *Stillwater* case the court observed that subdivision (7) merely recognizes and codifies the existing equity rule, stating (p. 837), "This statute, like the equity rule which it follows, applies only to express, technical, and continuing trusts, of the kind which were cognizable exclusively in a court of equity." We do not believe the provisions of the decedent's will appointing defendant managing advisor, heretofore quoted in footnote 1, create an express trust. Plaintiff argues that defendant was in effect co-executor. We do not agree. As a nonresident corporation, the bank could not serve as executor under Florida law. Florida Statutes, 1941, §655.27. The decedent expressly recognized in his will that the defendant could not serve as executor, and did not nominate defendant to such office. The court did not appoint the defendant executor.

Plaintiff concedes that it has found no case like this one and that he has no direct authority holding that a person in the position of the managing advisor in the present case

is a trustee of an express trust. Examination of the provisions of the will convinces us that the managing advisor is not a trustee of an express trust. No title to any trust property is placed in the defendant, the will stating, "I have given them the powers of approval and direction with no intent to place the title to or any interest whatsoever in, my estate during probate, in said Managing Advisor." Restatement of Trusts, §2h, states:

> *"The elements of a trust.* As appears in this Section a trust involves three elements, namely, (1) a trustee, who holds the trust property and is subject to equitable duties to deal with it for the benefit of another; (2) a beneficiary, to whom the trustee owes equitable duties to deal with the trust property for his benefit; (3) trust property, which is held by the trustee for the beneficiary."

A trust can not be created unless there is trust property. Restatement of Trusts, §74; 54 Am. Jur. 44. In *Farmers State Bank of Fosston v. Sig Ellingson & Co.,* Minn., 16 N. W. 2d 319, the court makes the following statements (pp. 322, 323):

> "An express trust, as distinguished from a resulting or a constructive one, involves the separation of the legal and beneficial interests in a thing or *res,* as it is called, whereby the legal interests in the trust *res* are held by a person, the trustee, for the benefit of another, the beneficiary, who has an equitable interest in the *res* to receive whatever benefits he is entitled to therefrom by the terms of the trust. * * *
>
> * * * * *
>
> "* * * To constitute an express trust, there must be a designated trustee, a designated trust *res,* and a designated beneficiary. * * *"

Since in our present case no property is placed in the hands of the managing advisor, there can be no express trust.

Plaintiff next contends that in any event the managing advisor's duties are analogous to those of a trustee of an express trust, and that defendant is a quasi trustee and, as such, is to be treated as a trustee of an express trust. In support of this position plaintiff cites *U. S. National Bank of Portland v. First National Bank of Portland,* 172 Ore. 683, 142 P. 2d 785; *Gathright v. Gaut,* 276 Ky. 562, 124 S. W. 2d 782; *Donahue v. Quackenbush,* 62 Minn. 132, 64 N. W. 141. *Donahue v. Quackenbush* involved a situation where a court-appointed receiver in possession of plaintiff's land acquired legal title to some of the land in his possession as receiver through execution proceedings upon a judgment he purchased. It was held that trust obligations were placed upon him by his appointment as receiver and his taking possession of the property, and that the statute of limitations did not run until repudiation of the trust. It is noted that in the *Donahue* case the receiver was acting under court appointment and was placed in possession of the real estate by such appointment.

We find nothing in the *Donahue* case that clearly indicates that the Minnesota court would extend the express trust obligation to the factual situation in our present case. Neither the *U. S. National Bank of Portland* case, supra, nor the *Gathright* case, supra, involved any question pertaining to the statute of limitations. In each of these cases the court found that the advisor involved was not in a strict sense a trustee of an express trust. Each case contains a statement that the responsibilities of the advisor are analogous to those of the trustee. However, we believe that substantial distinctions exist between a trustee and an advisor. The advisor does not have possession of the trust property or the proceeds thereof. We have found no decided case in

Minnesota or elsewhere which has gone to the extent of holding a fiduciary who is not operating under court order and has neither title to nor possession of trust property is to be treated as a trustee of an express trust for statute of limitations purposes. It is impossible for us to say with any degree of certainty that the Minnesota Supreme Court will, when and if this problem is presented to it, extend the statute of limitations applicable to express trusts to cover the managing advisor relationship present in this case. This court has frequently stated that upon doubtful questions of local law it will not adopt a view contrary to that of the trial judge unless convinced of error. *Buder v. Becker*, 8 Cir., 185 F. 2d 311. We are not convinced that the trial court committed error in determining that the statute of limitations applicable to this case is subdivision (1) of Section 541.05, Minnesota Statutes Annotated.

The trial court in its opinion states (p. 693):

> "* * * With the possible exception of an express trust and fraud, or fraudulent concealment, the statute of limitations commences to run from the time of the commission of the act complained of, and, in my opinion, the fiduciary relationship does not toll the running of the statute."

The foregoing statement is supported by authority set out in footnote 15 to the trial court's opinion. The trial court fixed March 19, 1953, as the date on which the statute of limitations operated to bar plaintiff's claims. The final accounting of the executors in the Florida probate court was filed on February 6, 1947. Notice of hearing thereon was served upon all parties interested in the estate. On March 19, 1947, plaintiff, his wife, and other beneficiaries filed detailed objections to the final accounting of the executors. After due hearing the court on April 18, 1947, overruled all objections, approved the final accounting, and ordered

distribution of the remaining assets to the residuary trustee. The trial court in effect found that the extensive objections filed indicated that the plaintiff and the other objectors on March 19, 1947, had knowledge of all substantial violations of which they are now complaining which occurred between the opening of the estate in 1942 and the 1947 accounting. Many of the matters now objected to occurred in the early years of the administration of the estate, and were fully disclosed in reports filed, copies of which were furnished the beneficiaries of the estate.

Plaintiff claims that the statute of limitations did not commence to run before November 11, 1954, which is the date on which this estate was closed and the executors discharged. The Minnesota court has held that the statute of limitations commences to run when the action accrues, and that the action accrues against an executor or administrator and his bondsman on the date of entry of the final decree of distribution, and the fact that the fiduciary is not formally discharged until a later date does not suspend the running of the statute of limitations. *Burns v. New Amsterdam Casualty Co.*, 205 Minn. 391, 285 N. W. 885; *Ganser v. Ganser*, 83 Minn. 199, 86 N. W. 18.

Plaintiff next contends that the running of the statute of limitations was tolled since the defendant represented both sides of conflicting claims, and that as trustee of the residuary trust it alone possessed the right of action against itself as managing advisor. Plaintiff relies on *Yager v. Liberty Royalties Corporation*, 10 Cir., 123 F. 2d 44, and language therein to the following effect (p. 47):

> "But it is implicit in the statute that before the period begins to run there must be some one in existence by whom, and a different person against whom, the claim may be enforced. That is an implied underlying principle of the statute. And the statute therefore is

> tolled during the time one person represents both sides of a conflicting claim. * * *"

The reason for the rule stated in the foregoing quotation is that it is inequitable to hold the statute of limitations has run when there is no one in existence other than the party in whose favor the statute runs to assert the claim. In the present case, however, the reason for asserting the rule does not exist. The executors' handling of the estate was fully approved by the 1947 order approving their final accounting. The executors certainly were proper parties to bring an action against the managing advisor in behalf of the estate for any damages caused by breach of duty by the managing advisor. The executors were not finally discharged and released until 1954. They remained in office more than six years after the approval of their final accounting, and during that period the statute of limitations ran in favor of the managing advisor. There is no allegation in the pleadings of any concealment or fraud practiced upon the executors by the managing advisor such as would toll the statute. It would also seem that if plaintiff can properly bring the present action he could have brought the said action within the limitation period. At the time plaintiff commenced this action the executors had not been discharged. The managing advisor in response to plaintiff's complaints repeatedly denied that it had violated any of its duties. Plaintiff had ample reason to believe that the defendant as trustee did not propose to bring any action against itself for breach of its duties as managing advisor. Plaintiff, upon proper showing to the probate court, could have obtained an order requiring the executors to bring the action, or to have an administrator ad litem appointed to represent the estate in the event the executors were interested adversely to the estate. See §732.55, Florida Statutes, 1941.

Where an action is commenced after the lapse of the

applicable statute of limitations, the burden is upon the plaintiff to plead and prove that the unreasonable delay in the assertion of his rights was because the facts on which his rights were based were not discovered until within the statutory period. *Sweet v. Lowry,* 131 Minn. 109, 154 N. W. 793; *Whitcomb v. Wright,* 176 Minn. 274, 223 N. W. 294; *Stark v. Equitable Life Assurance Society,* 205 Minn. 138, 285 N. W. 466; *Chisholm v. House,* 10 Cir., 183 F. 2d 698. Defendant in its brief asserts that the plaintiff in his pleadings does not allege that he did not have knowledge of the facts stated in his complaint for less than six years prior to the commencement of the action. Plaintiff in his reply brief makes no attempt to show where he has made such an allegation. We are unable to find any proper allegation of concealment or undiscovered fraud in plaintiff's pleadings. Plaintiff in his brief makes some attempt to show that additional information was acquired within the statutory period of limitations. We believe that the plaintiff had sufficient knowledge of the wrongs of which he is complaining to start the operation of the statute of limitations. We believe that the following statement made by the Fifth Circuit in *Phillips Petroleum Co. v. Johnson,* 155 F. 2d 185, 191, is applicable here:

> "He [the plaintiff] could not wait to acquire better proofs, but should sue and then use the implements the Rules of Procedure provide for extracting from the opposite party and others the full truth. He cannot wait more than four years to investigate. * * * We do not understand that full and precise knowledge is requisite. That has not yet been attained perhaps. It is enough for one to know that he has a cause of action * * *."

Plaintiff has not established his contention that his claims constitute a single cause of action. Such a result would not

necessarily follow even if an express trust existed. In the case of express trusts the statute would commence to run upon performance or repudiation of the trust with knowledge thereof by the cestui. See *Johnston v. Johnston,* 107 Minn. 109, 119 N. W. 652, 655. It seems apparent to us that in this case plaintiff is charging a series of wrongful acts committed at different times. Under subdivision (1), it seems clear that the statute commences to run upon each wrongful act at the time that it is committed.

We have carefully examined the record in this case, including the exhibits not a part of the printed record. From such examination we are satisfied that the plaintiff had full knowledge of all alleged breaches of duty by the managing advisor, upon which he is now relying, and which occurred prior to the final accounting of February 16, 1947. Copies of all accountings were furnished and made available to the parties interested in this estate, and, in our opinion, all beneficiaries had adequate information concerning all substantial transactions up to and including those contained in the 1947 final accounting. This is fully demonstrated by the contents of plaintiff's objections to the final accounting, consisting of 20 pages. There, as here, objection was made to failure to require the executors to pay interest on excessive daily balances; to sales of bonds and stocks at less than their appraised value; to unreasonable delay in making distribution; to inept handling of estate and income tax problems; to mismanagement of E. C. Warner Company, Ellsworth Company, and Oldworth Trading Company, Ltd., companies owned or controlled by the estate; to improper accounting and management of the entire estate; and to the incurring and payment of needless and excessive expenses. Serious objection is also made to the payment of executors' fees in the amount of $400,000 in which defendant participated as managing advisor. The order al-

lowing these fees was entered after notice and hearing in 1945. Plaintiff objected to these fees in 1947, including in his objection his contention that the fees were in violation of a contract entered into by the banks serving as executors and defendant with the decedent, limiting fees to $50,000 in the absence of litigation. All objections were overruled. In disposing of the 1947 objections the court states:

> "The court finds from the evidence and the admissions made that the objecting respondents have, at all times, been fully informed concerning the administration of this estate and that said objectors, and all interested parties, have been voluntarily furnished, from time to time, with data and information concerning said estate and of the steps in its administration, and the Court further finds that the Executors have never, at any time, refused to these objecting respondents, or any other interested party, any requested information pertaining to the administration of this estate. The Court further finds that there is no evidence whatsoever to support the objections interposed to the final accounting filed herein. It is further the finding of this Court that said objections are not only not well founded but that they were not filed in good faith but were in the nature of a fishing expedition and interposed for the purpose of delay. * * *"

After plaintiff's motion for rehearing upon objections to the final accounting was denied, plaintiff and his wife commenced action in the United States District Court for the Southern District of Florida against the executors and defendant for damages for excessive fees allowed by the probate court, claiming the difference between $400,000, executors' fees paid, and $50,000, the claimed contract limit, and also recovery of $275,000 attorneys' fees paid. The

Florida federal court sustained the motion of the Florida banks for summary judgment of dismissal, stating that jurisdiction for fixing fees was in the probate court, and specifically finding that "full disclosure was made by the defendant banks to the plaintiffs herein of the material matters relating to the alleged contractual limitation of executor's fees and attorney's fees."

The defendant, although made a party to the above Florida federal court proceeding, did not join in the motion for summary judgment.

Plaintiff brought many suits in many courts raising the questions which he is now raising. A detailed comparison between the charges made by the plaintiff in his objections in the probate proceedings and the various other proceedings which he commenced with the allegations of the present complaint would consume much space and serve but little purpose. We are convinced, after careful consideration of all of the records before us, that the plaintiff had knowledge of all of the substantial breaches of duties he is claiming in his present complaint at the time he filed his 1947 probate objections. We are therefore convinced that the trial court properly held that all claims based on transactions occurring before the filing of objections of plaintiff to final report on March 19, 1947, were barred by subdivision (1) of section 541.05 of the Minnesota statutes.

Plaintiff's complaint is very broad and alleges continuing breaches of duty. The estate was not finally closed until November 11, 1954, and some assets of the estate were retained by the executors until 1954. We believe that the managing advisor's duties continued until the estate was closed. Obviously, any transaction involving a breach of the managing advisor's duties occurring within six years from the date of the commencement of the action would not be barred by the statute of limitations. It would seem

that most of the substantial transactions about which the plaintiff is complaining occurred before 1947. However, because of the broad allegations of the complaint, which must be deemed admitted for the purpose of passing on the motion for summary judgment, we can not say with certainty that no cause of action has arisen since 1947. Defendant has conceded that claims 6 and 18 are not barred by limitations. Claim 6 is a claim for reimbursement for attorneys' fees in an action brought in Canada in 1949 to seek information regarding the Oldworth Company. Claim 18 is for expenses incurred by plaintiff in 1948 in successfully resisting an executors' claim for reimbursement for attorneys' fees incurred by the executors in defense of plaintiff's action in a Florida federal court against the executors for recovery of fees.

The judgment of dismissal on the ground of the statute of limitations will be affirmed as to all claims based upon any transactions occurring on or before March 19, 1947. The judgment will be modified to exclude from the bar of the statute of limitations claims 6 and 18, and any claims based upon any transaction occurring subsequent to February 15, 1948, or any transaction occurring after March 19, 1947, and not discovered by beneficiaries until after February 15, 1948.[2]

This case is remanded to the trial court for further proceedings not inconsistent with the views expressed in this opinion.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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[2] Since the first report filed by executors after the 1947 final accounting was not filed until July, 1948, there is a possible fact question as to whether beneficiaries had knowledge of any improper conduct occurring after March 19, 1947, and before the statute of limitations became operative on February 15, 1948.

APPENDIX B

(Judgment)

United States Court of Appeals
For the Eighth Circuit
No. 15478
September Term, 1955.

Tuesday, September 11, 1956.

Harold L. Warner,

Appellant,

vs.

First National Bank of Minneapolis.

Appeal from the United States District Court for the District of Minnesota.

This cause came on to be heard on the record from the United States District Court for the District of Minnesota, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of dismissal of the said District Court in this cause on the ground of the statute of limitations be, and the same is hereby, affirmed as to all claims based upon any transactions occurring on or before March 19, 1947; and the said judgment is hereby modified by excluding from the bar of the statute of limitations claims 6 and 18, and any claims based upon any transaction occurring subsequent to February 15, 1948, or any transaction occurring after March 19, 1947, and not discovered by the beneficiaries until after February 15, 1948.

It is further ordered by this Court that the cost of printing appellant's record and appellee's supplemental record be divided, two-thirds to be taxed against the appellant,

and one-third against appellee. The appellant having paid the sum of $928.25 for printing his record, and the appellee having paid the sum of $509.96 for printing its supplemental record, making a total of $1438.21, the appellant is to pay two-thirds of this amount, or $958.81, and the appellee is to pay one-third of this amount, or $479.40. It is therefore now here ordered that the appellee, First National Bank of Minneapolis, recover from the appellant, Harold L. Warner, the sum of Thirty and 56/100 ($30.56) Dollars, being the difference between the amount taxable against the appellant and the amount paid, and have execution therefor.

And it is further ordered by this Court that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the views expressed in the opinion of this Court this day filed herein.

September 11, 1956.

APPENDIX C

(Order Staying Issuance of Mandate)

United States Court of Appeals
For the Eighth Circuit
No. 15478
September Term, 1956.

Monday, September 24, 1956.

Harold L. Warner,

Appellant,

vs.

First National Bank of Minneapolis.

Appeal from the United States District Court for the District of Minnesota.

On consideration of the motion of appellant for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

September 24, 1956.

APPENDIX D

(Clerk's Certificate)

United States Court of Appeals
For the Eighth Circuit

I, E. E. Koch, Clerk of the United States Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains record printed by appellant, consisting of two volumes, and supplemental record printed by appellee, on which the appeal from the United States District Court for the District of Minnesota was heard and determined in said Court of Appeals in the case of Harold L. Warner, Appellant, vs. First National Bank of Minneapolis, Appellee, No. 15478, together with copies of the opinion and judgment of said Court of Appeals and order staying issuance of mandate.

And I do further certify that there was transmitted to said Court of Appeals for use at the hearing of the case in said Court the originals of Exhibits 1 through 30-c to Affidavit of Frank W. Plant, Jr., consisting of three volumes, and said volumes of exhibits are transmitted to the Supreme Court of the United States for use in connection with petition for writ of certiorari.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, on the 26th day of September, A. D. 1956.

Clerk of the United States Court of
Appeals for the Eighth Circuit.